



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 37 OF 2006

SAMMY KIILU MUSAKI.....1ST PLAINTIFF

JACKSON MUTUKU KAVOI.....2ND PLAINTIFF

VERSUS

MUISYO MUTUNGA.....1ST DEFENDANT

MUEMA MUTUNGA.....2ND DEFENDANT

MASYULA MUTUNGA.....3RD DEFENDANT

MWIKUYU MUTUNGA ALIAS (mwai mutunga).....4TH DFENDANT

ROSE KALUU MUTUNGA.....5TH DEFENDANT

JUDGEMENT

The Plaintiffs filed this suit on 24th April, 2006 seeking judgement against the Defendants jointly and severally for:

- a) A declaratory order that the Plaintiffs are the registered proprietors in common in equal shares of land parcels numbers WAMUNYU/KAMBITI/ 350 and WAMUNYU/KAMBITI/351 entitled to possession and use of the same.
- b) An order for eviction of the 1st Defendant (MUISYO MUTUNGA) from land parcel number WAMUNYU/KAMBITI/350.
- c) Perpetual injunction restraining the Defendants by themselves or through their agents, servant and or employees from interfering with land parcel numbers WAMUNYU/ KAMBITI/ 350 and WAMUNYU/ KAMBITI/ 351.
- d) Costs of the suit.
- e) Any other relief the Honourable Court may deem fit and just to grant.

The Defendants entered appearance and filed a joint Defence on 8th May, 2006. The Defendants denied the allegations in the Plaint and stated that it contains falsehood as the land in question belongs to their late grandfather. Further that the house alleged to be built in the year 2006 was built sometime back in the year 1999 and that they have been in the land since they were born but for their mother since 1953 when she got married. They state that the Plaintiffs' have never entered the land in question but only came to

claim the same in December 2005 with the title deeds being obtained in a FUNNY manner. They insist the Plaintiffs' are their cousins and have filed the suit to embarrass them for no apparent reason. Further that the land in question is an ancestral land and their uncles TIMOTHY KIILU, KILUNDO KIILU, KINYUMU KIILU and cousins MAUNDU KAVOI, MITU MUSAKI and brothers PHILIP MUTUNGA and WILSON MUTUNGA are all older than them and they wonder why they were the only ones sued. On 10th May 2006 the firm of messrs FM MULWA , Advocate took over the conduct of the matter on behalf of the Defendants but on the 22nd March, 2007 the Defendants filed a Notice to Act in Person but later retained the said firm once again.

On 24th April, 2008 the Plaintiffs sought an injunction to restrain the Defendants by themselves or agents, servants and/or employees from trespassing on land parcels number WAMUNYU/KAMBITI/350 and WAMUNYU/KAMBITI/351(suit lands) pending the hearing and final determination of the suit, and on 10th June, 2008, the Judge granted the said injunctive orders. On 5th June, 2009, the Plaintiffs further sought orders to commit the Defendants to civil jail for being in contempt of Court, but this application was dismissed on 18th July, 2013 as the Judge cited lack of proper service upon the Defendants.

On 17th May, 2017 the matter proceeded for hearing at 10.07 a.m but the Defendants' counsel messrs FM MULWA advocates were absent. The Court notes that earlier at 9.15 a.m one KYALO Advocate had held brief for the said firm seeking an adjournment claiming they were not able to get their clients but when the Court declined to grant this order, he did not appear in Court again to proceed. The Plaintiffs' proceeded with one witness and closed their case including the Defendants'.

The 2nd Plaintiff **JACKSON MUTUKU KAVOI** who is PW1 is the cousin of the 1st Plaintiff who granted him an authority to act in this matter. He stated that the suit revolved around land parcel numbers WAMUNYU/KAMBITI/350 and WAMUNYU/KAMBITI/351(suit lands) which belonged to their paternal grandmother MARTHA MBULA KIILU alias MBULA KIILU. He stated that they share a grandfather with the Defendants and the said grandfather had four wives namely: first wife was KIASYO KIILU who had three sons MUTUNGA KIILU, KINYUMU KIILU and TIMOTHY KIILU while the 2nd wife who is the Plaintiffs' paternal grandmother had two sons JOSEPH KAVOI KIILU who is the 2nd Plaintiff's father and SAMSON MUSAKI KIILU who is the 1st Plaintiff's father. The third wife MATHII KIILU had five sons LAMU KIILU, MWONGA KIILU, KITIKU KIILU, KILUNDO KIILU and KIUSYA KIILU while the fourth wife KASIVA KIILU had two sons KIMONYI KIILU and KISILU KIILU. PW2 testified that during their grandfather's lifetime he had shared his land among all his four wives in 1969 as follows:

KIASYO KIILU - LR NO. WAMUNYU/KAMBITI/ 400 and 349

MBULA KIILU - LR NO. WAMUNYU/WAMBITI/350 and 351

MATHII KIILU - LR NO. WAMUNYU/WAMBITI/352 and 353

KASIVA KIILU - LR NO. WAMUNYU/WAMBITI / 354 and 355

He said that the Defendants paternal grandmother is KIASYO KIILU who was registered as the proprietor of land parcels number WAMUNYU /KIAMBITI /400 and WAMUNYU /KIAMBITI /349 respectively. In 2006 the Defendants' encroached on the suit lands which the Plaintiffs' inherited from their grandmother MARTHA MBULA KIILU alias MBULA KIILU. Further that in 1979 after the demise of their paternal grandmother, his father and uncle respectively petitioned for letters of administration intestate vide Machakos HCCC Succession Cause No. 8 of 1996 but died before a Certificate for Confirmation of Grant was issued. The 1st and 2nd Plaintiffs proceeded with the said Succession Cause and were later granted the Certificate for Confirmation of Grant on 3rd March, 2006, with title deeds to the suit land being issued on 11th April, 2006. He produced Certificate of Confirmation of Grant as Plaintiff Exhibit 'P1' and copies of the two title deeds to the suit land marked Plaintiff Exhibit P2'A' and P2'B' respectively.

PW1 testified that two of the Defendants MUISYO MUTUNGA and MUEMA MUTUNGA put up

structures on the suit lands and refused to vacate when asked to do so. He averred that the Defendants entered into the suit lands and commenced destroying trees but when asked by the local chief to stop, they declined. He testified that in 2010 through Justice Lenaola, they were granted orders of injunction against the Defendants who have persisted in their acts of encroachment. He said that they also brought in contempt proceedings against the Defendants but this was declined. Further that Defendants' who are their step cousins from the 1st grandmother's house had refused to respect their grandfather's allocation, yet the rest of the step cousins had done so. They have tried to mediate this issue at the family level but this is in vain as the Defendants' persist in their acts of trespass, they are unable to access the suit lands as the Defendants are using pangas and blocking them from accessing it.

The Plaintiffs' Counsel thereafter closed their case. There was no representation from the Defendants and he proceeded to close the Defendants' case too. He filed written submissions on 24th May, 2017 where he reiterated the facts of the case and submitted that in the Defendants' Defence, they never raised any triable issues and did not deny occupying the suit lands. Further, that they failed to file a counterclaim which in any event would have been statute barred and did not claim for adverse possession. He submitted that the Defendants' have not established a right over the suit lands; they pleaded that the title deeds held by the Plaintiffs' were obtained in a FUNNY manner which they failed to particularize to demonstrate what they termed as FUNNY.

The Plaintiffs in support of their case filed a List of witnesses; Letter of Authority by the 1st Plaintiff allowing 2nd Plaintiff to plead on his behalf and prosecute the case; Statement by the 2nd Plaintiff; Issues for Determination; Copy of Certificate for Confirmation of Grant to the estate of MARTHA MBULA KIILU alias MBULA KIILU dated 30th December, 2005 and copies of Title Deeds in respect of the suit lands. The Counsel submitted that if at all the Defendants had any claim to the Estate of the Plaintiffs' grandmother, they ought to have filed an objection in the Machakos HCCC Succession Cause No. 8 of 1986 or still file a suit based on fraud to cancel the title deeds issued to the Plaintiffs seeking to rectify the Register as provided for by section 80 (1) of the Land Registration Act 2012.

When the matter came up for hearing on 17th May, 2017, a representative from the firm of FM Mulwa Advocate for the Defendant who were duly served appeared in court seeking time to withdraw from acting which the Court rejected as it was not the first time they had made such an application. Later at 10.07 a.m, the Defendants did not appear in court, the 2nd Plaintiff proceeded to testify and also adopt the statement of the 1st Plaintiff.

The Plaintiffs' counsel filed their written submissions and stated that they had proved their case on a balance of probability.

Analysis and determination

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW2, I find that the following are the issues for determination:

- Whether the Plaintiffs are the absolute proprietors of the suit lands.
- Whether the Defendants, their agents and or servants have interfered with the Plaintiffs' actual possession including occupation of the suit lands.
- Whether the Defendants have a right over the suit lands.
- Whether the Defendants should be restrained from interfering with the Plaintiffs' actual possession and occupation of the suit lands.
- Who shall bear the costs of the suit.

The Law of Succession Act is very clear in terms of the process to be adhered to for parties to inherit the estate of a deceased. In the instant case, JOSEPH KAVOI KIILU and SAMSON MUSAKI KIILU who were fathers' to the 1st and 2nd Plaintiff's respectively had instituted the Machakos HC Succession Cause No. 8 of 1986 in respect of the estate of MARTHA MBULA KIILU alias MBULA KIILU but died before the same was determined. The Plaintiffs' later finalized it and were issued with a Certificate for Confirmation of Grant and thereafter got titles to the suit lands. PW 2 produced the said Certificate for

Confirmation of Grant dated 30th December, 2005 as exhibit 'P1' to prove their claim. The Defendants' who were also claiming to be beneficiaries of the deceased MARTHA MBULA KIILU alias MBULA KIILU failed to produce any proof of their claim. I note that they did not institute objection proceedings within the Machakos HCC Succession Cause No. 8 of 1986 and hence their claim as beneficiaries of the estate of MARTHA MBULA KIILU alias MBULA KIILU should not arise at this juncture. According to the evidence of PW2, during their grandfather's lifetime, he shared his land among all his four wives in 1969 as follows:

KIASYO KIILU - LR NO. WAMUNYU/KAMBITI/ 400 and 349

MBULA KIILU - LR NO. WAMUNYU/WAMBITI/350 and 351

MATHEI KIILU - LR NO. WAMUNYU/WAMBITI/352 and 353

KASIVA KIILU - LR NO. WAMUNYU/WAMBITI/354 and 354

The Court notes that each of the wives got two parcels of land. No evidence was adduced by the Defendants' nor pleaded that there were family protests when the grandfather distributed land to his four wives in 1969 during his lifetime. The Defendants are the dependants of KIASYO KIILU who was allocated land parcel numbers WAMUNYU/KAMBITI/ 400 and WAMUNYU/KAMBITI/349 respectively but claim they are also entitled to the suit parcels by virtue of being step grandchildren of the late MARTHA MBULA KIILU alias MBULA KIILU. The Law of Succession Act at part V is clear in the sense that grandchildren can only inherit through their parents.

This position is affirmed in **the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** Where the Musyoka J held that ' **Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead.....'**

An examination of the proceedings at hand reveal that indeed the Plaintiffs' inherited the suit land after their respective fathers' who were sons to the registered proprietor had died. The Defendants' claim hence cannot supersede the Plaintiffs' as they are step grandchildren to the deceased MARTHA MBULA KIILU alias MBULA KIILU who was the owner of the suit lands.

The Land Registration Act at Section 26 (1) states as follows:

'The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

These provisions are very clear in terms of title to land being a prima facie proof of ownership unless there is evidence to the contrary. In the instant case the PW2 produced the title deeds (Plaintiffs' Exhibit P2'A' and P2'B' respectively) which I note were both issued on 11th April 2006, whilst the Defendants failed to produce any proof of ownership but allege titles were obtained in a FUNNY manner which they

have not substantiated. I hence find that the Plaintiffs are indeed the absolute proprietors of the suit lands and the Defendants do not have a right over the same.

Section 24 (a) of the Land Registration Act further stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....**'

These provisions empower the Plaintiffs' by virtue of being registered as owners of the two suit lands with vested rights and privileges therein and which no person should interfere with it.

The position is also reaffirmed in the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

The Plaintiffs claim the Defendants have interfered with their occupation and quiet possession of the suit land. The Defendants allege they have been residing thereon since 1999. However the Defendants' never came to court to rebut the Plaintiffs' claim and I find that the Plaintiffs' indeed are entitled to be protected by the law from the Defendants' who are interfering with their rights and privileges over the suit lands.

In the circumstances I find that the Plaintiffs' have proved their case on a balance of probability and proceed to enter judgment in their favour as follows:

- a) The Plaintiffs are the absolute proprietors in equal shares of land parcels numbers WAMUNYU/KAMBITI/ 350 and WAMUNYU/KAMBITI/351 are entitled to possession and use of the same.
- b) The 1st Defendant (MUISYO MUTUNGA) and or his representatives and or agents shall vacate the suit land namely WAMUNYU/KAMBITI/350 within six (6) months from the date of this judgment and in default, they shall be forcibly evicted.
- c) A permanent injunction be and is hereby issued against the Defendants, either by themselves, their servants, agents, and/or employees restraining them from interfering with the Plaintiffs' land parcel numbers WAMUNYU/ KAMBITI/ 350 and WAMUNYU/ KAMBITI/ 351.
- d) *This being a family dispute, each party shall bear his/her own costs.*

Dated signed and delivered in open court at Kajiado this 29th day of September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Sekento holding brief for Mbindyo for plaintiff

No appearance for F.M. Mulwa for defendant.